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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WENDY HIGHTMAN,

Plaintiff,

V.

FCA US LLC,

Defendant.

Case No. 3:18-cv-02205-BEN-KSC

FCA US LLC'S REPLY IN SUPPORT OF ITS ALTERNATIVE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

[CLASS ACTION]

DATE: February 11, 2019

TIME: 10:30 a.m.

JUDGE: Roger T. Benitez

COURTROOM: 5A

I. INTRODUCTION

Each of the six counts in Plaintiff’s First Amended Complaint (“FAC”) is premised on the same basic allegation: that FCA US hid from Plaintiff certain terms of the Lifetime Limited Powertrain Warranty (“the Warranty”) covering her vehicle prior to the time that she purchased that vehicle in 2007. It is undisputed that 1) Plaintiff purchased her vehicle in Guam, 2) the alleged misrepresentations and omissions that form the basis for her claims occurred in Guam, and 3) the Warranty that she claims is unconscionable was provided to her in Guam.

Based on the foregoing Plaintiff cannot credibly argue that California law governs her claims. She apparently realizes this as she now attempts to use her opposition brief to recast her claims as ones stemming entirely from FCA US's denial of a demand for coverage under the Warranty made by her in California in 2018.¹ But, as this District has repeatedly noted, a plaintiff cannot amend a complaint in an opposition to a motion to dismiss.² And, the claims that are pleaded are not legally viable under California law. For this, and a host of other reasons, the FAC should be dismissed.

II. ARGUMENT

A. Plaintiff Cannot Bring Her Claims Under California Law.

It is undisputed that Plaintiff purchased her vehicle in Guam, that the Warranty she complains about was issued in Guam, and that all of the alleged misrepresentations and omissions underlying her claims occurred in Guam. There can be no dispute about these facts because Plaintiff admits them in the FAC. *See* FAC, ¶¶ 26-28. Yet, Plaintiff now argues that it is “premature” to decide that she

¹See Plaintiff's Opposition to Defendant's Motion to Dismiss for Failure to State a Claim, ECF #21 ("Pl. Opp.").

²See, e.g., *Candor v. United States*, 1 F.Supp.3d 1076, 1082 (S.D. Cal. 2014) (“it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss” (quoting *Ruiz v. Laguna*, 2007 WL 1120350, *7 (S.D. Cal. 2013))).

1 has no claims under California law, and “California law may be applied to a
2 nationwide class in certain circumstances.” *See* Pl. Opp., pp. 2-6. These
3 arguments have no merit.

4 *First*, it is not “premature” to decide whether Plaintiff has any viable claims
5 under California law when the admissions she makes in the FAC are wholly
6 sufficient to make a choice of law determination. *See, e.g., Thornell v. Seattle*
7 *Serv. Bureau, Inc.*, 742 Fed. Appx. 189, 193 (9th Cir. 2018) (“determining which
8 state’s law applies is appropriate at the motion to dismiss stage, if the pleaded facts
9 allow it” (*citing Fields v. Legacy Health Sys.*, 413 F.3d 943, 949-53 (9th Cir.
10 2005))). The choice of law question here is **not** which law applies to the claims of
11 putative class members, but, rather, ***what law applies to Plaintiff’s own claims***.
12 And, Plaintiff **admits** every fact necessary to make that determination, *i.e.*, she
13 purchased her vehicle in Guam, the Warranty underlying her claims was issued in
14 Guam, and the fraudulent conduct she is complaining about all occurred in Guam.³
15 *See* FAC, ¶¶ 26-28. No discovery will change these facts that are dispositive of the
16 choice of law question.

17 Notably, a choice of law analysis is not even necessary to determine that
18 Plaintiff cannot bring claims under the CLRA, UCL or FAL. “[T]he ordinary
19 presumption against extraterritorial application of California law applies to UCL,
20 CLRA, and FAL claims, and such claims ‘are not supported where none of the
21 alleged misconduct or injuries occurred in California.’” *Figy v. Frito-Lay N. Am.*,
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23 ³Plaintiff confusingly mixes issues relating to personal jurisdiction with
24 those relating to choice of law when she argues that that “there are several
25 unanswered questions of fact that are of vital significance to a choice of law
26 analysis” such as “the particular functions” of an FCA US business center and
27 distribution center in California. Pl. Opp., p. 5. These facts simply have nothing to
28 do with what law applies to **Plaintiff’s** claims when she has not alleged, and in
good faith could never allege, any connection between these “functions” and her
own claim. In any event, **FCA US did not even exist in 2007** when the alleged
wrongdoing underlying Plaintiff’s claims occurred, and thus, at that time, it had **no**
“functions” in California.

1 *Inc.*, 67 F.Supp.3d 1075, 1086-87 (N.D. Cal. 2014) (*quoting Wilson v. Frito-Lay N.*
2 *Am., Inc.*, 961 F.Supp.2d 1134, 1147 (N.D. Cal. 2013)). Like the plaintiffs in *Figy*,
3 Plaintiff here “mistakenly conflate[s]” FCA US’s argument that the UCL, CLRA,
4 and FAL cannot apply to her claims “with the choice of law inquiry often required
5 at the class certification stage.” *Id.* at 1087.⁴

6 *Second*, Plaintiff is just wrong that California law can be applied to her
7 claims in this case because some courts have allowed application of this state’s
8 laws in nationwide class actions “in certain circumstances.” Pl. Opp., p. 3.

9 Plaintiff cites *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012),
10 *Czuchaj v. Conair Corp.*, 2014 WL 1664235 (S.D. Cal. 2014), and *Reed v.*
11 *Dynamic Pet. Prod.*, 2015 WL 4742202 (S.D. Cal. 2015), in support of her
12 argument. But, the courts in these cases were not analyzing factual admissions like
13 those made by Plaintiff here, and, in any event, in two of the three of these cases
14 the courts actually found that California law could **not** be applied to claims
15 accruing outside of California.

16 More specifically, in *Mazza* the Ninth Circuit expressly held that California
17 law could **not** be applied nationwide to claims based on alleged vehicle defects,
18 and, instead, the statutory fraud claims at issue were to “be governed by the
19 consumer protection laws of the jurisdiction in which the transaction took place.”
20 666 F.3d at 594. In *Czuchaj*, there was no indication that the allegations in the
21 operative complaint were sufficient to make a choice of law analysis as to the
22 named out-of-state plaintiffs’ claims and the court merely concluded that it would
23 not dismiss as to these plaintiffs based on a simple argument that the complaint
24 sought relief under California law. 2014 WL 1664235 at *7. And, in *Reed*, there

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26 ⁴Plaintiff does even not refute FCA US’s argument that California law does
27 not apply to her contract claims, and therefore concedes this point. *Bogart v.*
28 *Glenmark Generics, Inc., USA*, 2014 WL 5800577, *5 (S.D.Cal. 2014) (“A
plaintiff’s failure to respond to a party’s argument in an opposition to a motion to
dismiss amounts to a concession that such claims should in fact be dismissed”).

1 was no dispute as to the fact that California law applied to the named plaintiff's
2 claims since he purchased the product at issue in this state, but, notably, there this
3 District found, *at the motion to dismiss stage*, that the CLRA, UCL, and warranty
4 claims *had to be dismissed as to consumers purchasing outside this state* because
5 California law did not apply to them. 2015 WL 4742202 at **2, 9-10. Applying
6 the analysis of *Reed* here, Plaintiff's own claims must be dismissed.

7 It is true that there have been rare instances where courts have applied the
8 *consumer fraud* laws of California nationwide. *See, e.g., Wershba v. Apple*
9 *Computer, Inc.*, 91 Cal.App.4th 224 (2001). But, in such cases the defendant was a
10 corporation headquartered in his state, and the alleged fraudulent documents were
11 prepared at, and disseminated to consumers from, these headquarters. *Id.* And,
12 this District and others have found that even these types of contacts may not suffice
13 to support application of California law nationwide. *See, e.g., Conde v. Sensa*,
14 2018 WL 4297056, **13-14 (S.D. Cal. 2018); *see also Grace v. Apple, Inc.*, 328
15 F.R.D. 320, 343-48 (N.D. Cal. 2018). Obviously, here, where FCA US did not
16 even exist when the alleged wrongful conduct forming the basis of Plaintiff's
17 claims occurred, California law could never be applied nationwide.⁵

18 Plaintiff cannot amend her claims via her opposition brief by arguing that
19 they are really just based on FCA US's rejection of her demand for warranty
20 coverage for a vehicle repair she got in California. This purported singular act of a
21 breach is not what is pleaded as the basis of her CLRA, UCL and FAL claims (nor
22 would it be an adequate basis for those claims). *See* FAC, ¶¶ 26-28, 53, 64, 74, 76,
23 85-87, 95-96. And, at the heart of Plaintiff's breach of warranty claims lies the

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25 ⁵Whether Plaintiff is allowed to amend her complaint to add plaintiffs who
26 purchased their vehicles in California, as she contends she wants to do (*see* Pl.
27 Opp., p. 4), is irrelevant to the current motion which challenges *Plaintiff's* right to
28 invoke California law. *See, e.g., Chavez v. Wal-Mart Stores, Inc.*, 2014 WL
12591252, *2 (C.D. Cal. 2014) ("That absent class members may have claims
under these laws is immaterial—only Plaintiff's individual claims are presently
before the Court")

1 notion that some “unconscionable” conduct occurred when that warranty was
2 issued in Guam; it is clearly not based simply on the rejection of a claim for
3 warranty coverage in 2018. *See id.* at ¶¶ 53, 56, 64, 74, 76, 85-88, 95-96.

4 The FAC should be dismissed because Plaintiff does not have any legally
5 viable claims under California law.

6 **B. Plaintiff's Claims are Time-Barred.**

7 Plaintiff admits that this Court can dismiss her claims based on the statute of
8 limitations if the facts alleged show they are barred. *See Pl. Opp.*, p. 7. And, she
9 does not dispute that 1) her allegations in the FAC show the alleged
10 “unconscionable” and fraudulent conduct occurred in 2007 at the time she
11 purchased her vehicle, 2) she knew about this conduct and its relationship to the
12 Warranty no later than 2012 when she had her vehicle inspected as required, and
13 3) her claims are barred if, as the facts alleged show, she knew of this conduct in
14 2012. *See Pl. Opp.*, pp. 6-7. It is thus beyond debate that the pleaded facts prove
15 that all of Plaintiff's claims are barred by limitations.

16 Still, Plaintiff tries to salvage her claims by arguing that they are based on
17 “the breach” that occurred on July 6, 2018 when her demand for warranty coverage
18 was denied. *Id.* This argument defies logic because if Plaintiff knew in 2012 that
19 the Warranty required her to have her vehicle inspected every five years, she knew
20 then and there that if she failed to comply with this mandate any demand she made
21 for warranty coverage after non-compliance would be denied. Under Plaintiff's
22 theory her claims would not be barred by limitations in the year 2050 even if she
23 knew of the inspection requirement in 2012 provided she did not demand warranty
24 coverage until that time. This is nonsensical.

25 Furthermore, even a cursory review of the FAC makes it abundantly clear
26 that Plaintiff's claims are not based on the denial of her demand for warranty
27 coverage in 2018, but, rather, on the alleged withholding of information from her,
28

1 and the alleged unconscionable practices that occurred, in 2007 when she
2 purchased her vehicle and the Warranty was issued.

3 Plaintiff's claims are time-barred and should be dismissed.

4 **C. Plaintiff's Contract Claims Fail Because She Did Not Satisfy a**
5 **Condition Precedent.**

6 Plaintiff does not deny that FCA US had no warranty obligation to pay for
7 the repair to her vehicle in 2018 if she did not satisfy a condition precedent in the
8 Warranty. *See* Pl. Opp., p. 6. And, she admits that her admitted failure to have the
9 required 5-year vehicle inspection mandated by the Warranty was the reason her
10 demand for warranty coverage was denied. *Id.* Her only argument is that her
11 failure to comply with the inspection condition precedent is excused because the
12 inspection provision in the Warranty is unconscionable.⁶ *Id.*

13 Plaintiff's claim of unconscionability, like the rest of her claims, is time-
14 barred. "An unconscionability claim accrues at the moment when the allegedly
15 unconscionable contract is formed," and it is not a continuing wrong. *Yerkovich v.*
16 *MCA, Inc.*, 11 F.Supp.2d 1167, 1173-74 (C.D. Cal. 1997), *aff'd*, 211 F.3d 1276
17 (9th Cir. 2000). Filing a claim based on unconscionability 11 years after a contract
18 is formed is too late. *See, e.g., id.* at 1175.

19 In any event, Plaintiff has clearly failed to allege the facts necessary to plead
20 an unconscionability claim. To support such a claim, Plaintiff had to plead *facts*
21 showing that the inspection provision in the Warranty is both procedurally and
22 substantively unconscionable. *See, e.g., Aron v. U-Haul Co. of California*, 143
23 Cal.App.4th 796, 808 (2006). This means that Plaintiff was required to plead facts
24 supporting oppression and surprise, and that the terms of the Warranty created

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26 ⁶Whether or not a contract provision is unconscionable is determined at the
27 time a contract was made. *See, e.g., Armendariz v. Foundation Health Psychcare*
28 *Services, Inc.*, 24 Cal.4th 83 (2000)). The "contract" here (i.e., the Warranty) was
entered into in Guam. *See* FAC, ¶ 27. This fact lends further support to the fact
that California law does not govern any of Plaintiff's claims.

1 “overly harsh” or “one-sided” results to the extent they “shock the conscience.” *Id.*
2 Claims of unconscionability should not be considered where, as here, only
3 conclusory allegations are pleaded. *See e.g., Seifi v. Mercedes-Benz USA, LLC,*
4 2013 WL 5568449, *5 (N.D. Cal. 2013); *Shomaker v. GMAC Mortg., LLC*, 2012
5 WL 13020070, *4 (C.D. Cal. 2012).

6 Plaintiff does not actually allege, even in a conclusory fashion, that the
7 Warranty provision requiring a powertrain inspection every five years itself was
8 “unconscionable”. Rather, her allegations are that the withholding of the
9 information from her at the point of sale as to its existence was unconscionable.
10 And, even these allegations are nothing other than conclusory. Thus, Plaintiff is
11 not saved from her admitted non-performance of a condition precedent by the
12 doctrine of unconscionability. Hence, Counts I, II, and III should be dismissed.

13 **D. Plaintiff Waived Any Right to Seek Damages for Fraud.**

14 Plaintiff does not offer any opposition to FCA US’s argument that her fraud-
15 based claims in Counts IV, V, and VI must be dismissed for the separate reason
16 that she waived the right to sue for fraud when she affirmed the Warranty in 2012
17 and subsequently accepted the benefits of the Warranty. Because Plaintiff offers
18 no opposition to this argument, she effectively concedes that Counts IV, V, and VI
19 should be dismissed on this ground. *See, e.g., Bogart*, 2014 WL 5800577 at *5.

20 **E. Plaintiff’s Claims Are Barred By A Bankruptcy Court Sale Order.**

21 Plaintiff does not deny that the validity of her claims must be determined by
22 the Sale Order issued by the Bankruptcy Court in New York. *See* Pl. Opp., pp. 7-8.
23 Nor does she dispute that all of the claims she pleads are barred to the extent they
24 are based on events occurring prior to June 2009, when FCA US purchased certain
25 assets of a bankrupt entity. *Id.* Plaintiff simply argues that her claims are not
26 barred because they are based on FCA US’s alleged breach of the Warranty in
27 July 2018 when it denied her request for warranty coverage. FCA US agrees that if
28 Plaintiff re-pleads her claims and bases them *entirely* on its singular act of refusing

1 her warranty claim in July 2018, without regard to any events occurring at the time
2 the Warranty was issued, the Sale Order will not act as a bar of this claim.
3 However, Plaintiff has pleaded much more than this in the FAC. Since she now
4 apparently concedes that any claims pleaded based on anything other than
5 FCA US's own actions in July 2018 are barred, the FAC should be dismissed.

6 **III. CONCLUSION**

7 For the reasons outlined herein and in its Memorandum of Points and
8 Authorities in Support of its Motion to Dismiss (ECF #17-1), Defendant
9 FCA US LLC respectfully requests that this Court dismiss the First Amended Class
10 Action Complaint, and grant it all other relief.

11 Dated: February 4, 2019

HIGGS FLETCHER & MACK LLP

13 By: /s/ Edwin Boniske
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18 *Attorneys for FCA US LLC*

21 **CERTIFICATE OF SERVICE**

22 The undersigned hereby certifies that a true and correct copy of the
23 foregoing was served on February 4, 2019 on all counsel of record, who are
24 deemed to have consented to electronic service via the Court's CM/ECF system per
25 Civ.L.R. 5.4(d).

26 By: /s/ Edwin Boniske
27 Edwin Boniske (Bar No. 265701)